

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

DONALD CHARLES SPEIRS,

Petitioner,

v.

JEFFREY A. UTTECH,

Respondent.

No. C06-1543-JCC

ORDER

This matter comes before the Court on the Report and Recommendation of United States Magistrate Judge Mary Alice Theiler (“R&R”) (Dkt. No. 32), Petitioner’s Objections thereto (Dkt. No. 33), and Respondent’s Response (Dkt. No. 34). Having reviewed the materials submitted by the parties, and finding that oral argument is not necessary, the Court adopts the R&R.

**I. ANALYSIS**

Petitioner objects to the R&R, claiming (1) that not being invited to speak at his hearing was a denial of due process, and (2) that his other claims should not be dismissed for procedural defects because he either exhausted his state remedies or had cause for his failure to do so. His objections do not raise any new issues, nor does Petitioner present any new evidence.

1           **A.     Failure to Invite Allocution**

2           Petitioner alleges that the failure of the judge to invite allocution at his hearing was a violation of  
3 his due process rights. Magistrate Judge Theiler correctly noted that the U.S. Supreme Court has not  
4 recognized a constitutional right of allocution. The U.S. Supreme Court has specifically held that “the  
5 failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before  
6 sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of  
7 habeas corpus. It is an error which is neither jurisdictional nor constitutional.” *Hill v. United States*, 368  
8 U.S. 424, 428 (1962). The Court distinguished that case—where the defendant had not been invited to  
9 speak—from a hypothetical situation where the defendant was affirmatively denied an opportunity to  
10 speak. The Ninth Circuit has held that where a defendant has requested to speak, the denial of allocution  
11 is unconstitutional. *Boardman v. Estelle*, 957 F.2d 1523 (9th Cir. 1992). In Petitioner’s case, he did not  
12 request to speak at his hearing; therefore *Boardman* is inapplicable. The fact that Petitioner was not  
13 invited to speak is not a constitutional violation, and the Magistrate Judge’s decision to this effect is  
14 affirmed.

15           **B.     Exhaustion of State Remedies**

16           Prior to filing for habeas relief, petitioners must either exhaust all state remedies, 28 U.S.C. §  
17 2254(b)(1)(A), or show cause for failing to do so and show resulting prejudice. *Coleman v. Thompson*,  
18 501 U.S. 722, 749–50 (1991). The Magistrate Judge held that Petitioner failed to present his claims to  
19 any state court. Petitioner argues that he (1) exhausted his claim of insufficient evidence and (2) had  
20 cause for failing to exhaust his other claims, and that prejudice resulted.

21           **1.     Exhaustion of Insufficient Evidence Claim**

22           Although Petitioner did present his claim of insufficient evidence to the Washington Court of  
23 Appeals, he did not raise this issue as a double jeopardy claim or any other federal claim. His appeal was  
24 based entirely on state law. The Magistrate Judge correctly held that Petitioner failed to exhaust state  
25 remedies for the federal double jeopardy claim.

